Exhibit 13
Rec'd 10/10/01

Hearing on Proposed Physician Panel Rules
Department of Energy
Washington, DC
October 10, 2001

Testimony

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On behalf of the Department of Energy
Worker Advocacy Advisory Committee

My name is Steven Markowitz, MD. I am a physician specializing in occupational medicine, that is, identifying and reducing workplace exposures that impair or threaten human health. I currently serve as Professor and Director of the Center for the Biology of Natural Systems of Queens College and Adjunct Professor of Mount Sinai School of Medicine, both in New York City. I direct the Worker Health Protection Program, the former and current worker medical surveillance program at the three Department of Energy gaseous diffusion plants at Oak Ridge, Tennessee; Portsmouth, Ohio; and Paducah, Kentucky and at the Idaho National Engineering and Environmental Laboratory. In the past 2 and ½ years, we have screened for occupational disease over 5,000 workers at these four Department of Energy facilities.

I present comments at these hearings today on behalf of the Worker Advocacy Advisory Committee, a Federal Advisory Committee, which was appointed by the Department of Energy to provide the Department with advice about the portion of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) that addresses state workers' compensation claims for occupational diseases caused by toxic occupational exposures. I am a member of this committee, chair its sub-committee on physician panels, and was asked by the full committee at our last meeting on August 28, 2001 to present these comments today. These comments were endorsed by a majority of the Committee. I also attach to our written comments a letter sent by the Worker Advocacy Advisory Committee to Secretary Abraham on August 31, 2001. These letter addresses many of the issues raised by these proposed regulations, and we would like it included in the record of these proceedings.

1. Use of State-Based Workers' Compensation Criteria

The most significant problem with the proposed regulations lies with the primacy given to state-based "applicable criteria" for judging the validity of workers' compensation claims (Preamble and Sections 852.5, 852.6, 852.11). The proposed regulations will require that a claim meet these criteria, as determined by the Department of Energy, and to be described in the agreements between the Department of Energy and

the States. We regard this approach as fundamentally flawed in all of its variations described in the Discussion of Proposed Rule section of the published Guidelines.

The flaws with strictly applying state-based criteria of workers compensation to the program established by EEOICPA are multiple. Taken singly, each of these flaws would be sufficient to oppose use of the state-specific criteria in the manner proposed by the Department of Energy. Taken together, they form an overwhelming argument to support abandonment of the use of state-based criteria for the determination of claim validity under the EEOICPA.

First, the proposed approach undermines the clear intent of the Act to facilitate the flow of workers' compensation to claimants with occupational diseases caused by the toxic exposures in Department of Energy facilities. The EEOICA arose in response to the admission by the Federal Government that it had failed for decades to protect its nuclear weapons workers; that this failure had resulted in a clear pattern of occupational disease and death among such workers; and that such workers deserved recompense for this work-related harm and for the Federal Government's failures to prevent such harm. The Federal compensation benefits for radiation-related cancer, silicosis, and chronic beryllium disease address selected conditions that are relatively specific to working with nuclear weapons. To be sure, the other conditions that are caused by exposure to toxic materials and that are the subject of Subpart D of EEOICPA are less specific than the conditions noted above. But, more importantly, they are no less injurious to their victims, and they occur as a result of the same failures committed by the Federal Government described above.

In Subpart D of EEOICPA, Congress addressed specifically some of the most egregious barriers that prevent sick workers from obtaining needed compensation benefits. Since workers often do not have access to occupational medicine experts to address causation of disease, Congress established physician panels as a way to make such expertise available throughout the nation. In order to overcome the automatic opposition to occupational disease claims that occurs so frequently in workers' compensation proceedings, Congress directed the Department of Energy not to contest claims in which the physician panels have found occupational causation. Congress was

quite clear: The central goal of EEOICPA in general and Subpart D in particular is to assist workers to obtain what they need and deserve for their occupational illnesses.

The purpose of Subpart D of the Act is to encourage the close cooperation between the Department of Energy and state workers' compensation systems to overcome a historic pattern of denial of workers' compensation benefits for Department of Energy workers and to reconcile the current state workers compensation systems with the needs of Department of Energy workers that are not well served by the system.

It then makes absolutely no sense for Department of Energy to resurrect, voluntarily and through rulemaking, the barriers in state workers' compensation systems that have been used to deny compensation to deserving workers in the past. The Act promises that the Department of Energy will assist workers with occupationally caused diseases to obtain compensation. Through the proposed rules, the Department of Energy *voluntarily* re-creates all of the old barriers to the payment of compensation. Please note that these state administrative and legal barriers can be waived by employers and insurers: there is no requirement that the Department of Energy resurrect these barriers in the consideration of claims under the EEOICPA. It make no sense for the Federal Government to undertake a very substantial effort to provide for proper review of medical causation by physician experts drawn from around the nation, as required by the Act; to not contest valid claims, as required by the Act; only then to revive a set of state-based legal and administrative barriers to deny otherwise valid claims of Department of Energy workers. To do so contravenes the will of Congress.

The second flaw in the proposed use of state-based criteria is that their use is not feasible. It simply will not work in any of the variations that are described in the proposed rule or any that could be otherwise envisioned. The reason is straightforward. It is not feasible to reduce the highly contentious, variable, and evolving sphere of occupational disease compensation to a straightforward administrative decision-making process utilizing state-specific workers' compensation standards for occupational illness. The unavoidable problem is the nature of the state-based workers compensation criteria for occupational disease. The state-based requirements ("applicable criteria") are often vague, difficult to apply in specific cases, and subject to varying and evolving

interpretations. An ultimate decision is made through a highly disputed process that involves claimants, attorneys and judges with considerable knowledge and experience but who nonetheless often disagree about the interpretation and application of workers compensation law.

Under the proposed rules, the Program Office of the Department of Energy will adopt this function and will purport to make fair and consistent application of state-based criteria for all types of occupational diseases from no fewer than the dozen or more states that have the Department of Energy facilities. Further, the Department of Energy proposed to achieve all of this in the absence of the enormous collective experience of the judges of those states and in the absence of the normal legal representation of the claimants. We do not believe that the Department of Energy can in fact achieve this at all, much less in a manner that preserves the rights of claimants and fulfills the dictates of EEOICPA.

Third, we believe that the proposed use of state-based criteria is flawed, because we find no evidence in Subpart D of the EEOICA that the Department of Energy has the authority to use state-based criteria in this manner. In the Act, we find no detailed directive from Congress that specifies that the Department of Energy must or should adopt the functions of, and to re-create the mechanism of, state-based workers' compensation systems. In the proposed rules, the Department of Energy aims to go beyond its mandate, and, further, in a manner that will very likely reverse any potential gains that claimants will achieve through the physician panel review process and the no-contest provisions of Subpart D of EEOICPA.

Is there then any role of state-based criteria for judging the validity of workers' compensation claims? Very limited indeed. We believe that the intent of the legislation is for the validity of a claim under Subpart D to be determined based upon the physician panel's determination that the applicant suffers from a disease caused by exposure to toxic substances at Department of Energy facilities. If, upon review, the Department of Energy has accepted the determination by the physician panel that the claim involves an occupational disease caused by the applicant's Department of Energy -related work, the applicant should receive the compensation, including disability benefits and medical care. Thus, the level of benefits will vary based upon the applicable state law, but the validity of the claim will be determined by the Department of Energy through the physician

panels, subject to Department of Energy review, which entails examination of the same type of evidence that the physician panel has reviewed.

In place of using additional state-based criteria, we propose the equivalent of the voluntary payment of workers' compensation claims that many employers undertake under existing state systems when the employer is satisfied with the merits of the claim. In essence, employers may waive many defenses when they choose to pay these claims, and they may waive them for a variety of reasons. In this case, the Department of Energy, while not the employer, has a close relationship with the employer. Thus, we argue that, given the underlying intent of the EEOICPA to rectify past injustices, the Department of Energy should apply a relatively liberal standard in deciding to pay claims voluntarily.

In sum, we believe that item 3 in Section 852.5 and items (b) and (c) in Section 852.6 should be deleted, so that the claim of any Department of Energy employee whose employment at a covered Department of Energy facility is verified and who claims an illness that may be due to toxic exposures arising from Department of Energy employment should be submitted to a physician panel once adequate information is gathered to allow the panel to make its determination. Section 852.6 should be rewritten in its entirety to reflect the statutory language that requires State Agreements to be negotiated in order to assist Department of Energy claimants to obtain compensation, rather than to re-erect state barriers to the payment of compensation. If the physician panel makes a positive determination of causality, then Department of Energy should make the needed arrangements to have the claim paid, subject to the benefit levels set out in state workers' compensation law.

2. Issues of Causation

We concur with the proposed standard of "more likely than not" (Section 852.7) to be used by the physician panels in judging the relation between occupational exposures and subsequent illness. However, we do not believe that Section 852.7 gives adequate guidance to physician panels to make decisions about causality. We strongly recommend replacing the word "*caused*" in part (b) of Section 852.7 with the words "*contributed, aggravated, or caused.*" This revised definition is in accordance with how state workers'

compensation systems historically have defined causation. In addition, the expanded definition more accurately captures the multi-factorial nature of disease causation. Finally, it more appropriately describes the medical decision-making process that occupational medicine physicians use in addressing causality of occupational illnesses.

In line with our comments above, we vigorously disagree that the physician panels should use state-based criteria to make judgments about causality of occupational disease (p. 46745 of the Proposed Rules). The proper domain of physicians with expertise in occupational medicine is to render a judgment about medical causation, that is, to bring to bear the full knowledge available from all medically relevant disciplines – biology, epidemiology, toxicology, pathology, etc. – to a question about the relationship between a set of exposures and subsequent illness. That judgment about medical causation will not vary from state to state, because it depends on biology, not on legal or administrative inventions. Physician panels should base their decisions only on medically relevant factors. Indeed, that is exactly what we do every day in state workers' compensation proceedings. This task reflects the limits of our expertise. Therefore, physician panels that review Department of Energy claims should not be asked to consider any legal or administrative refinements of causal criteria in making their determinations. Thus, Section 852.11 (c) (4) should be deleted.

3. Re-Review of Physician Panel Decisions

Section 852.15 gives the Department of Energy excessive freedom to order re-review of physician panel determinations. Clearly, the development of new information on a claim or the presence of conflict of interest by a physician panel member are legitimate grounds for re-review of a claim by a physician panel. However, allowing Department of Energy to order a re-review when the Department has "good cause" [Section 852.15 (a)(3)] or when the Department has "doubt" about the original panel's determination [Section 852.15 (b)(1)] is too open-ended. This proposed language goes beyond what is specifically state in the Act and would allow the Department of Energy to review any case that it wishes. This power will diminish the credibility of Department of Energy and the entire physician panel review process and will undermine Subpart D.

Furthermore, allowing re-review of physician panel decisions for "quality assurance" purposes [Section 852.15 (a)(2)] and to ensure "consistency" [Section 852.15 (b)(3)] may be necessary to monitor the program, but it should only be used for assessing the validity of the overall program. Such re-reviews should not be used to change the original decision rendered by the initial physician panel review. Otherwise, how will the Department of Energy decide, on scientific grounds, which of the two determinations, if they differ, was correct?

4. Payment for Medical Expenses of Claimants

We note that the proposed rules make no allowance for the Department of Energy to pay any medical expenses associated with claims submitted under Subpart D. Although we appreciate any potential concern with creating an open-ended medical care program, there a legitimate, important and limited role that the Department of Energy can play in assisting its workers obtain compensation.

Section 3662 (c) states that, after the Secretary has submitted a claimant's application to a physician panel, the " Secretary shall assist the employee in obtaining additional evidence within the control of the Department of Energy and relevant to the panels' deliberations." To comply with this directive to assist, the Department of Energy should pay for the expenses that claimants incur specifically as a result of medical tests that the physician panels request in order to make a final decision regarding causality of disease. Based on the experience of the Fernald medical panel and our own experience in medical decision-making about occupational disease, we expect that the amount of testing that the panel physicians will require and the associated expenses will be quite limited.

The rationale for paying for such medical expenses is that, following submission of a claim, applicants will occasionally be asked by the physician panels to undergo testing that is not necessary for the treatment of their illnesses but is necessary for the full determination of the cause of their illnesses. Since the request for such testing will be generated by the Department of Energy and will be for medical tests that the claimant's

treating physician has not deemed necessary for the proper treatment of the claimant, then we believe that the Department of Energy's statutory obligation to assist such claimants should extend to paying for the limited expenses of the medical tests required by the physician panels.

There is additionally the likelihood, in the absence of such payments recommended above, that the Department of Energy will generate enormous ill will from claimants who are asked by the physician panel to undergo and to pay for selected tests, whose claim is ultimately and properly denied on the basis of a lack of causal connection by the physician panel, who will then be worse off financially then prior to claim submission.

5. Materials Required of Claimants in the Application Process

Section 852.4 (e) states that claimants must submit any materials or information required by the Program Office above and beyond the items specified in parts (a) through (d) of the same section. This requirement should be re-phrased to allow a claim to proceed even in the absence of such information. We do not object to the Department of Energy's request for additional information, but believe that a claim should not be disallowed on the basis of failure to comply with such a request.

6. Obligation of the Department of Energy to Assist Workers

Finally, we would also like to use this opportunity to raise important issues regarding the progress that Department of Energy has made in fulfilling its legal obligation under Subpart D of EEOICA to assist Department of Energy workers obtain compensation. We have serious concerns that the claims filing and processing systems that are being put into place will not provide the prompt access and resolution that have been promised by the Department of Energy. We have been advised that the current staffing and processing may not provide sufficient resources to move claims to an early decision in a reasonable time. Resource center staff are not trained to assemble the information necessary for Subtitle D claims. Claimants have said that they are not

receiving necessary assistance in the development of their employment and exposure histories, a task that the Department of Energy clearly must fulfill under the Act. Claimants are not being alerted to the state forms that must be completed or to the need to identify an employer for a state claim. Costs to claimants of duplication of medical records are sometimes prohibitive, and could be controlled in some states if requested under state workers' compensation guidelines. No process is yet in place for the development of full occupational histories and exposure records for claimants, an essential Department of Energy responsibility under Subtitle D. It now appears that the necessary components to move ahead with implementation of Subtitle D of the EEOICPA may not be in place until the end of calendar year 2001, at the earliest. In the meantime, claimants may have claims denied in the state workers' compensation systems that they may be unable to reopen later. The Department of Energy is charged by the Act with assisting claimants. We urge the Department of Energy to provide sufficient staff and assistance to claimants so that claims made under Subtitle D receive prompt and fair consideration.

The proposed regulations, in Sections 852.3 and 852.4, suggest that the entire burden for development of the necessary information for a claim rests upon the claimant. This fails to reflect the directive of the EEOICPA that the Department of Energy should assist claimants in developing these claims. An additional section should be added that sets out the mechanisms by which the Department of Energy will assist claimants, particularly in the development of the necessary information regarding employment and exposure histories.

7. Department of Energy Former Worker Medical Surveillance Program

We are puzzled why the Department of Energy has failed to use its own Former Worker Medical Surveillance Program to accelerate and to enhance the activities that it has undertaken to implement Subpart D of EEOICPA. This occupational disease screening program is national in scope, has screened over 10,000 Department of Energy workers for occupational disease in the past 3 years, and has gained the trust and developed the expertise of working with Department of Energy workers with occupational diseases. It has successfully enlisted the cooperation of many partners – universities, unions, and contractors throughout the Department of Energy complex.

The Former Worker Medical Surveillance Program is Department of Energy 's own program. In undertaking such a program, the Department of Energy has demonstrated its willingness in part to be accountable and to be responsible for occupational illness in a manner that is unprecedented in the public or private sector in the United States. It is a jewel, and the Department of Energy is missing a vital opportunity in failing to link the activities required by Subpart D with the activities it supports under the Former Worker Medical Surveillance Program. We urge that the Department of Energy act quickly to exploit this natural link.

One final comment. Subpart D of the EEOICA requires the Department of Energy in Section 3661(d)(3) to develop regulations about how physician panels will review claim applications and make determinations. In the proposed regulations, the Department of Energy has chosen to develop regulations, not just about this one small section, but about the entirety of Subpart D. It is not clear why the Department of Energy has chosen to regulate all aspects of Subpart D. While we appreciate the desirability of transparency in explication of complicated issues, the chosen method to raise and resolve such issues through regulations risks decreasing the flexibility to the Department of Energy to change aspects of a program that is complex by its nature and quite likely to require mid-course correction.

Thank you for the opportunity to provide these comments on these important proposed regulations.

Appendix

Letter with Attachment from
DEPARTMENT OF ENERGY Worker Advocacy Advisory Committee
to Secretary Abraham, August 31, 2001

Exhibit #13 (cont'd)
Rec'd 10/10/01

WORKER ADVOCACY ADVISORY COMMITTEE
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

August 31, 2001

Honorable Spencer Abraham
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue S.W.
Washington, D.C. 20585

Re: Energy Employees Occupational Illness Compensation Program Act of 2000

Dear Secretary Abraham:

I am writing to you on behalf of the Worker Advocacy Advisory Committee (WAAC) to raise a number of concerns with regard to the Department of Energy's implementation of the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA). At its last meeting in Denver on August 28-29, 2001, and in its prior meetings, the WAAC has concluded that the recommendations in this letter are crucial to the successful implementation of a program of compensation under Subtitle D of the EEOICPA. These recommendations have been communicated verbally at our meetings to the staff of the Office of Worker Advocacy (OWA), but as a committee we have also concluded that it is important to bring them directly to your attention. Please note that every recommendation in this letter is supported unanimously by Committee members unless otherwise noted.

As you know, the EEOICPA was designed to provide just compensation to American workers who have been made ill by their work in the U.S. nuclear weapons complex. Subtitle D of the Act requires the Department of Energy to assist these workers in obtaining compensation under state workers' compensation laws. In order to accomplish the goals of this legislation, the members of WAAC believe that it is essential that DOE do the following:

1. DOE must set aside federal funds to pay workers' claims against current DOE contractors under the provisions of Notice 350.6 that are validated by the DOE/HHS-appointed physicians panels. We strongly urge that these funds be in addition to those currently allocated to contracts, and that DOE seek supplemental appropriations for this purpose if necessary.

2. If compliance with Notice 350.6 is to be accomplished within current contract parameters, it is critical that DOE ensure, through appropriate procurement mechanisms, that current contractors will not be penalized in any way for their compliance with orders to pay claims, without litigation, under this program. Costs of complying, including costs of evaluations or payment for any aspect of the workers' compensation claims under the EEOICPA, must not be considered in the contractor's compliance with any contract requirements or qualification for bonuses or incentive payments under their contracts. OWA and procurement must work cooperatively to achieve this critical goal.

3. DOE must allocate funds to pay directly (not through insurers or prior employers) for workers' claims that involve exposure at DOE facilities where there is currently no contractor with a contract. These claims are not affected by Notice 350.6. This should include claims involving employees of Atomic Weapons Employers, Beryllium Vendors, employers at privatized DOE sites, predecessor employers where the current contractor does not have responsibility for claims, prior and current subcontractors where the current primary contractor does not have responsibility for the claim, and claims for which insurers are legally responsible for payment.

4. All workers' claims in which the worker presents evidence that he or she worked in a DOE facility and he or she suffers from any illness that the worker or a physician believes may have been caused by toxic exposure at these facilities should be evaluated by the DOE/HHS-appointed physicians panels.

5. The physicians panels should use a uniform standard to evaluate medical causality in order to determine whether it is more likely than not that a worker's medical condition was caused, aggravated or accelerated by the worker's exposure to toxic substances at one or more DOE facilities. The physicians panels should not be asked to make determinations regarding the legal compensability of claims in the various state jurisdictions.

6. Any claim in which a physicians panel has determined that the workers' illness meets this standard of medical causality should be considered a valid claim by DOE, in the absence of significant evidence to the contrary. WAAC members, with only one dissenting vote of a voting member, feel that this is critical to appropriate implementation of this program. The amount and duration of benefits will be determined under the applicable state workers' compensation law and will therefore vary from one state to another.

7. The efficient and fair processing of claims is essential. DOE must move quickly to promulgate necessary rules, develop essential procurement and budgeting components, and hire and train crucial staff. Cooperation with other agencies is critical. Cooperation (and any written agreements) with state workers' compensation programs should be designed to assist claimants under this program, as is required by the Act. DOE must continue to work cooperatively with DOL in order to provide claimants with the most seamless and simple claims process possible.

8. Quality assurance and performance measures must be developed and utilized from the outset. Continual monitoring will provide helpful information to the Department in order to make the program a success. It will also provide information, and hopefully reassurance, to the many workers, employers, and advocacy groups who are following the implementation of the program.

We elaborate on many of these points in greater detail in the Attachment to this letter. We feel that these points are absolutely essential to the successful implementation of Subtitle D of the EEOICPA.

Members of the Committee would be happy to discuss these issues with you at your convenience. We believe that your direct leadership is critical to ensuring the success of this program. As advisors to DOE, we are taking the steps to let you know of our concerns before the disappointment of the claimants overwhelms the good will that has been generated by the government's willingness to acknowledge the harm caused to American workers made ill by nuclear weapons production.

Sincerely yours,

Emily A. Spieler
Chairman
Worker Advocacy Advisory Committee

cc: Deputy Secretary Robert G. Card
Acting Assistant Secretary Steven Cary
Members of WAAC
Judy Keating, OWA

Attachment
Workers' Advocacy Advisory Committee Recommendations to the Secretary of Energy
August 31, 2001

Background

In January, Secretary Richardson appointed the Worker Advocacy Advisory Committee (WAAC) as a federal advisory committee under the Federal Advisory Committee Act to provide advice on workers' compensation policy to the Department of Energy. In particular, the Committee has been asked to assist DOE as the Department has undertaken the very complex task of implementing its responsibilities under the EEOICPA. The members of the committee are national experts in the fields of occupational medicine and workers' compensation, as well as representatives from communities, contractors, and unions affected by the EEOICPA.

Since January, the Committee has met on several occasions to review progress with DOE officials and has provided specific recommendations to DOE regarding implementation of the EEOICPA. In addition, members of the Committee have devoted considerable time to providing assistance, guidance and recommendations through the Committee's subcommittee structure as well as individually. We have all recognized that this program affords an extraordinary opportunity for the government to provide fair compensation to many workers who were employed at the DOE Weapons Complex or by the suppliers and processors involved in nuclear weapons activity.

We wish to commend the staff of DOE, and particularly of the Office of Worker Advocacy (OWA), for their good will and good faith in developing the programs and offices necessary to assist those filing with the Department of Labor (DOL) as well as the many thousands of workers who expect their claims to be processed by the OWA. DOE has done a commendable job in holding public meetings and in opening offices within the time frame required by the EEOICPA.

Setting up a new program is never easy, and this startup has been complicated not only because the statute has a number of complex features but also because the very tight time frame required implementation by July 31, 2001. Perhaps the most significant factor has been the change in Administrations which left DOE's ES&H directorate short staffed and without significant policy leadership during this very difficult time.

During the course of our full WAAC meetings as well as during many subcommittee meetings, we were asked as a Committee for our views on such issues as claims development and processing, standards for decision making, payment and procurement, relations with state agencies, and other substantive issues relating to this compensation program. We have as a Committee responded to each of these requests, often with very detailed suggestions to the staff.

Our starting point is this: Subtitle D of the EEOICPA is specifically designed to encourage just compensation, through state workers' compensation programs, for workers who worked and were made ill by their exposure to toxic substances in this country's nuclear weapons industry. The Act is intended to change the historical practice of resisting payment of these claims and to provide compensation where it has previously been fought and denied. DOE is called upon to assist workers with these illnesses when DOE/HHS appointed physicians panels conclude that

the illness is likely to have been caused by work at a DOE facility.

At this point, we have a number of serious concerns about the direction that DOE is taking with respect to the resolution of some of these matters.

Payment of valid workers' compensation claims

It is essential that the process that is being developed by the OWA provide for the approval and prompt payment of claims for state workers' compensation benefits made by workers with illnesses caused by their work at DOE facilities (as determined by the DOE/HHS-appointed physicians panels). A commitment by DOE to pay these claims is critical to ensure prompt and adequate implementation of the Act.

1. *Contractor Reimbursement Procurement Issues.* The DOE issued Notice 350.6 shortly after the EEOICPA was enacted. The purpose of that Notice was to provide the path for DOE contractors to pay workers' compensation claims found to be valid by the OWA. Under the program, when DOE determines that a claim is valid, it is to instruct the Contractor not to contest that claim in the State system. Not long after the WAAC began its work, the potential limitation of that Notice in terms of the details of the various types of contracts entered into by DOE with its various contractors became obvious. Our WAAC Subcommittee worked with OWA staff to propose various contractual and administrative remedies to carry out the Notice. We are, however, deeply concerned that these issues are not yet resolved, and many new hurdles seem to be developing to thwart prompt payment of these claims. Contractors are concerned that no allocation has been made for the payment of claims, that no provision has been made for adjustment of other contractual obligations based upon the need for payment of these claims, and that they will essentially be penalized in other ways if they comply with Notice 350.6. We urge you to review the procurement issues promptly and to promulgate the necessary contractual instructions so as to make the claims payable in a speedy fashion without penalizing contractors who make good faith efforts to comply. This must include clear assurances that payment of any costs associated with these claims will not be counted against a contractor's compliance with other terms of its contract or against its ultimate performance for receipt of any bonus or incentive payments.

2. *Payment of valid state claims in the absence of current DOE contractors.* Equally important is the fact that large numbers of state workers' compensation claims are likely to be filed by workers who were employed by employers that do not have current contracts with DOE. This will include claims in which predecessor contractors, subcontractors, insurers or now privatized employers may technically be the responsible party. In addition, claims will continue to be filed after current contractors successfully decommission sites. None of these claims will be paid by contractors under Notice 350.6. Even if we assume that current claims involving existing contractors may be addressed by the appropriate implementation of Notice 350.6, the claims of these other workers must be addressed. This Committee has strongly, repeatedly, and unanimously urged that DOE stand in the place of the prior contractors and subcontractors and pay these claims directly without allowing third parties, including special state funds and

insurers, to raise defenses to the claims that were not contemplated under the EEOICPA. We again reiterate that recommendation. Referral of these claims to state mechanisms will result in lengthy litigation, unreasonable delays, and ultimately in denial of claims that should be valid under the EEOICPA . It will also result in serious inequities among workers who worked in the same state and sometimes at the same site.

3. The budgetary issues created by the EEOICPA must be addressed. Both the development of the necessary information to assist claimants in their pursuit of benefits (including researching employment and exposure histories) and the paying of benefits will require dedicated resources. The WAAC strongly urges DOE to seek supplemental appropriations to pay for these costs if the current DOE appropriations are not adequate. WAAC members and their constituencies would gladly support any attempt to seek funding for this purpose.

Assistance to Claimants and Prompt Claims Processing

We have serious concerns that the claims filing and processing systems that are being put into place will not provide the prompt access and resolution that have been promised by DOE. We have been advised that the current staffing and processing may not provide sufficient resources to move claims to an early decision in a reasonable time. The steps needed to enable the physicians panels to make determinations are still under discussion. Resource center staff are not trained to assemble the information necessary for Subtitle D claims. Claimants have said that they are not receiving necessary assistance in the development of their employment and exposure histories, a task that DOE clearly must fulfill under the Act. Claimants are not being alerted to the state forms that must be completed or to the need to identify an employer for a state claim. Costs to claimants of duplication of medical records are sometimes prohibitive, and could be controlled in some states if requested under state workers' compensation guidelines. No process is yet in place for the development of full occupational histories and exposure records for claimants, an essential DOE responsibility under Subtitle D. It now appears that the necessary components to move ahead with implementation of Subtitle D of the EEOICPA may not be in place until the end of calendar year 2001, at the earliest. In the meantime, claimants may have claims denied in the state workers' compensation systems that they may be unable to reopen later. DOE is charged by the Act with assisting claimants. We urge DOE to provide sufficient staff and assistance to claimants so that claims made under Subtitle D receive prompt and fair consideration.

DOE must work cooperatively with state workers' compensation agencies in order to assist claimants in this program. Written agreements with the states must be finalized quickly, with specific attention to providing assistance to claimants under this program, as is required by Section 3661(a) of the Act. We also encourage DOE staff to work closely with state information services and ombudsmen. DOE staff and state personnel can be cross trained so that both systems work together in resolving claims. DOE should also devote significant resources to program outreach to assure that all eligible workers are fully informed about the program and the process for asserting their claims.

We further urge DOE to maximize the level of claims processing integration with the Department of Labor. To the extent possible, information that is gathered on claims (particularly

medical, exposure and occupational histories) should be gathered only once and then shared among the agencies, consistent with any necessary signed release from claimants.

Functioning of Physician Panels and Relationship to State Laws

The physician panels are the key component of the DOE assessment of workers' claims in which state workers' compensation benefits should be paid. The WAAC has recommended that there be as few barriers as possible to assessment by the physicians panels: any claim in which a worker has evidence that he or she worked in a DOE facility and in which the worker or the worker's physician asserts that the worker suffers from an illness associated with this exposure should be reviewed by the physicians panels. In order to provide the kind of equal justice contemplated by the Act, it is important that the physician panels get all cases with disease diagnoses and DOE employment histories, without exclusion of any potential claim by DOE staff.

The WAAC has not seen a copy of the current draft of the regulations governing physicians panels. DOE has suggested in earlier drafts that the physicians panels may be asked to apply state legal criteria in making medical determinations of whether an illness was caused or aggravated by exposures in DOE facilities. We are concerned that such requests may impose a difficult burden upon the physicians panels. Moreover, the physicians panels will be made up of experts in determining medical causality, not in parsing state legal provisions. Our committee strongly believes that physician panels should be making their determinations based on a uniform standard governing medical causality and should not be expected to make any determinations regarding legal issues. This standard for medical causation is whether it is more likely than not that the claimant's illness was caused, aggravated or accelerated by his or her exposure to toxic substances while working at a DOE facility.

Failure to proceed in this way will create serious inequities among workers who worked at different facilities and undermine the public's confidence in the program. In particular, state statutes of limitation, specific disease exclusions, increased burdens of proof when occupational disease claims are made, or rules governing last injurious exposure or apportionment have no place in the physicians panel determinations of the legitimacy of these claims under EEOICPA. We urge you to develop a system that is based on the physicians' determination of work-relatedness.

Please note that we are not proposing any intrusion into state law, any action that would violate federal preemption standards, or federalization of state workers' compensation programs. Rather, this program involves a determination by the federal government that the exposure of these workers was related to their work in the weapons program. Once this determination is made, payments and medical care will be made as authorized by the applicable (and different) state laws. Workers with valid claims under the EEOICPA will receive the level of benefits provided under the state law. What we are proposing is the equivalent of the voluntary payment of workers' compensation claims that many employers undertake under existing state systems when the employer is satisfied with the merits of the claim. In essence, employers may waive many defenses when they choose to pay these claims, and they may waive them for a variety of reasons. This is a firm or enterprise level decision, unrelated to the outcome of claims that are fully litigated through state systems. In this case, DOE is the equivalent of the firm, and the

underlying intent of the EEOICPA to rectify past injustices suggests that DOE should apply a relatively liberal standard in deciding to pay claims voluntarily.

Finally, we must reiterate what we stated above: it is absolutely essential that current contractors not be penalized, *in any way,* for their compliance with DOE orders to pay these claims.

Quality Assurance and Performance Evaluation

Quality assurance and performance evaluation must be started immediately. The OWA and DOE will benefit from monthly reports on claims processing and approval. The WAAC also needs better information in order to provide adequate advice under our charter. Because it has been impossible for DOE to estimate the volume of claims that will be filed or the number that will need serious review or the number that will merit payment, it has been extremely difficult to devise either a claims processing system or a payment system that will meet the demands of the program. At this point, it is not clear that the state Memoranda of Understanding, when combined with Notice 350.6 and the draft of the regulations governing physicians panels, will together create a system that will provide efficient, fair, and quick resolution of workers' claims. It is essential that the system be reviewed and modified as information becomes available in order to ensure that the original purposes of the EEOICPA are met. We therefore urge that quality assurance and performance evaluation be made a high priority in the coming weeks.

Respectfully submitted,

Emily A. Spieler Aug 31, 2001

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